

1 tell us?

2 THE WITNESS: Sitting here today,

3 I don't know the number.

4 MR. SCHMIDT: I don't think it's
5 in evidence.

6 JUDGE SIPPEL: Well, let's --

7 okay, but it's [REDACTED]. Is
8 that right?

9 THE WITNESS: Actually, I think it
10 was somewhat higher than that for some reason.
11 I thought it was -

12 JUDGE SIPPEL: Maybe it was [REDACTED]
[REDACTED]?

14 THE WITNESS: I think it was
15 roughly -- listening to it, I thought it was
16 between [REDACTED] when I was listing
17 to the discussion, but I may be wrong.

18 MR. SCHMIDT: Mr. Orszag, I don't
19 want you to testify about what you heard
20 someone say in court. I want you to tell me
21 if you know the number.

22 THE WITNESS: I do not know the

1 number sitting here.

2 MR. SCHMIDT: Okay.

3 JUDGE SIPPEL: Good question.

4 Now, the thing is, though, that it's
5 considerably less than [REDACTED].

6 MR. SCHMIDT: Yes, sir.

7 JUDGE SIPPEL: Now, why is this
8 apples and oranges, because I don't understand
9 that.

10 THE WITNESS: Let me try to
11 explain, as best I can. To have an apples-to-
12 apples comparison, you'd have to actually look
13 at the prices that every MVPD in the entire
14 country is paying. The number that was
15 presented yesterday was just the cost that
16 Comcast, as a distributor of programming would
17 pay. This is the rights fee that Comcast, as
18 a programmer, would pay to the NFL. So,
19 Comcast would then try to -- would be charging
20 every MVPD some of this -- would be trying to
21 charge, it's not clear that they would be able
22 to get that, they would make money on this,

1 but they would try to charge and make money on
2 this from all MVPDs instead of a single one.

3 So, the [REDACTED] -

4 JUDGE SIPPEL: Who's going first?

5 The NFL would be making this charge?

6 THE WITNESS: Let me -

7 JUDGE SIPPEL: It's obvious that

8 they're looking to be paid [REDACTED] per

9 customer.

10 THE WITNESS: Yes, let's start

11 with the Comcast programming side.

12 JUDGE SIPPEL: Yes.

13 THE WITNESS: So, Comcast as a

14 programmer, according to this would pay [REDACTED]

[REDACTED] to the NFL, effectively; [REDACTED]
16 in terms of cash, and [REDACTED] of value. If

17 Comcast had actually won the eight-game

18 package, if they had gotten the eight-game

19 package, they would then turn around in a

20 different market and go to every MVPD,

21 DirectTV, Echo Star, Verizon, AT&T, Cox, all

22 the ones that are on this chart.

1 JUDGE SIPPEL: Yes.

2 THE WITNESS: And say we now have
3 more valuable content. Are you willing to pay
4 us more for that valuable content? And those
5 MVPDs may say you know what, we actually don't
6 view that content as that valuable, so we're
7 only willing to pay you a little bit more for
8 it. They may say we'll be willing to pay you
9 some amount more for it, but it may be a small
10 amount, it may be a lot.

11 That amount for all MVPDs is
12 equivalent only to the part that they -- that
13 was talked about yesterday for Comcast. So,
14 one would have to, in essence -- let me try it
15 this way; that if every MVPD, including Time
16 Warner, Cablevision, Charter, Bright House,
17 Sudden Link, Mediacom had to pay [REDACTED].

18 JUDGE SIPPEL: Yes.

19 THE WITNESS: The number, and I'm
20 going to try to do the math quickly in my
21 head, but it would very likely be much greater
22 than [REDACTED].

1 JUDGE SIPPEL: All right.

2 THE WITNESS: And that would be a
3 more apples-to-apples comparison.

4 JUDGE SIPPEL: But the [REDACTED], is
5 that a very conservative estimate, is it a low
6 estimate?

7 THE WITNESS: It doesn't mean -

8 JUDGE SIPPEL: It doesn't mean
9 much.

10 THE WITNESS: It doesn't mean
11 anything, because they would have -- it's like
12 a business. If you walk into -- we'll use the
13 crab example. The person selling crabs goes
14 and pays some money to the fisherman. That's
15 what the [REDACTED] is. But they're not,
16 necessarily, going to get that money back from
17 people walking in to buy it that day. There
18 may be few people walk in. That's what that
19 [REDACTED] was actually a parallel to.
20 So, it's very possible that when the crab, on
21 a given day, that crab seller loses money
22 because it pays one number to the fisherman,

1 and he can't get that back from its consumers.

2 So, that's why it's apples and oranges. It's

3 just a completely different market.

4 BY MR. SCHMIDT:

5 Q Let me pick up on your example,

6 stick with the crabs.

7 A Crabs it is.

8 Q Let's say a restaurant buys [REDACTED]

[REDACTED] in crabs from a crab seller.

10 A It's a lot of crabs.

11 Q It's a lot of crabs, and they're

12 pretty nice crabs, let me tell you. Would you

13 expect, if the restaurant was at all sensible,

14 that it had an expectation that it could turn

15 around and sell those crabs to customers to

16 cover its [REDACTED]?

17 A Expectation, yes.

18 Q Okay.

19 A But it may not happen in reality.

20 Q But you would -- if it was a

21 rationally -- if it was an economically

22 rational restaurant owner, then it would be

1 able to cover the [REDACTED] it spent on
2 crabs. Right?

3 A We have to assume profit
4 maximization, so yes. I would assume that
5 they would expect to make money on that
6 transaction, or, if not, they wouldn't have
7 engaged in that transaction in the first
8 place.

9 Q Comcast is a profit maximizing
10 company. Right?

11 A Yes.

12 Q In your view, it's economically
13 rational. Right?

14 A Yes.

15 Q When Comcast offered to pay [REDACTED]
[REDACTED] for these eight games, it thought that
17 Versus was going to be able to turn around and
18 get carriers to pay for it. Right?

19 A They did include that, yes.

20 Q And, in fact, they actually
21 figured out how much they were going to
22 charge, didn't they?

1 A What they were going to ask.

2 Q What they were going to ask. Yes.

3 And I'd like to show you one of those
4 documents.

5 MR. SCHMIDT: This has been marked
6 into evidence as Enterprises Exhibit 160. May
7 I approach?

8 JUDGE SIPPEL: Yes, please. Thank
9 you.

10 MR. SCHMIDT: Thank you, Your
11 Honor.

12 JUDGE SIPPEL: Now, this is in?

13 MR. SCHMIDT: This is in, Your
14 Honor.

15 JUDGE SIPPEL: Enterprise Exhibit
16 160 is in. Thank you.

17 BY MR. SCHMIDT:

18 Q Do you remember me showing you
19 this document in your deposition?

20 A I do.

21 Q This is something that the folks
22 at Versus prepared that looked at how they

1 would try to charge Time Warner if they got
2 the games. Right?

3 A Let's be clear, because I think at
4 the deposition we talked about this, that it's
5 not only the price that they pay if they got
6 the games, but, also, if they got other sports
7 rights.

8 Q Where does it say that in here?

9 A There's -- I've seen other
10 material like these presentations that have
11 the dollar amount of additional sports rights
12 that they were seeking to acquire, and it has
13 precisely these same figures.

14 Q Let's look at this one, because I
15 have not seen those documents. I want to
16 focus on this document. What's the title of
17 this document, please?

18 MR. CARROLL: Your Honor, just so
19 it's clear, we produced those documents.

20 MR. SCHMIDT: They don't exist.

21 MR. CARROLL: I believe counsel
22 has seen those documents.

1 MR. SCHMIDT: They don't exist.

2 MR. CARROLL: I don't want that
3 statement to be left in the record.

4 MR. SCHMIDT: When you call your -

5 JUDGE SIPPEL: I'm sorry. You
6 didn't get a chance to look at them, or you --
7 wait, wait, wait, wait. You -

8 (Cough.)

9 JUDGE SIPPEL: -- and they're in
10 the record.

11 MR. SCHMIDT: We have all their
12 documents. I don't believe the documents Mr.
13 Orszag described exist, but why don't I ask
14 him about this document, which we have in
15 front of him.

16 JUDGE SIPPEL: I'm confused now.
17 You're saying you haven't had a chance to read
18 the document?

19 MR. SCHMIDT: No, I've had a
20 chance to read this document, Your Honor. And
21 I'd like to go through it with Mr. Orszag.

22 JUDGE SIPPEL: So there isn't any

1 suggestion here that there was late delivery
2 of documents, or anything like that.

3 MR. SCHMIDT: No, not at all, Your
4 Honor.

5 JUDGE SIPPEL: All right.

6 MR. SCHMIDT: Not at all.

7 BY MR. SCHMIDT:

8 Q Do you see the title of this
9 document?

10 A Yes, I do.

11 Q What does it say?

12 A "Time Warner 2006 Plan with NFL on
13 OLN".

14 Q And then if you look, it's got a
15 heading underneath that for OLN. That's
16 Versus, right?

17 A Yes.

18 Q Back then it was called the
19 Outdoor Life Network.

20 A That is correct.

21 Q What does the second bullet point
22 say?

1 A "NFL Surcharge effective 1/1/07 to
2 12/31/2011."

3 Q Okay. And that's the same time
4 period that Comcast was trying to buy the
5 eight-game package for. Right?

6 A I believe that to be correct.

7 Q And do you see the next bullet
8 says "Rates"?

9 A Yes.

10 Q And then it has what's called a
11 "Rate Card." Do you know what a rate card is?

12 A Yes, I do.

13 Q What is a rate card?

14 A It's the price that a programmer
15 will seek to charge in say the opening round
16 of a negotiation with a distributor.

17 Q Okay. And this is a rate card for
18 OLN with time Warner. Right?

19 A That is correct.

20 Q And it has the existing rates, and
21 it has a surcharge it was looking at charging.
22 Right?

1 A It has a surcharge which I believe
2 includes much more material than just the NFL.

3 Q I want you to testify about what
4 you have first-hand knowledge of. There's
5 nothing on this document that refers to
6 anything other than NFL, is there?

7 A Well, I don't have any first-hand
8 knowledge of this document, in general,
9 because I wasn't there when they created it.

10 Q Well, then let's stick to what
11 this document says. This document says, "NFL
12 Surcharge." Right?

13 A Well, it says, "NFL Surcharge" in
14 the second bullet. But then the next one it
15 just says "Surcharge."

16 Q Okay. And below it says, "TWC has
17 30 days to accept the NFL upon surcharge
18 notification." Right?

19 A Yes.

20 Q Now, what is the surcharge that
21 Comcast was going to charge in 2008?

22 A [REDACTED].

1 Q What was the surcharge it was
2 going to charge in 2009?

3 A [REDACTED]

4 Q What was the surcharge it was
5 going to charge in 2010?

6 A [REDACTED]

7 Q What was the surcharge it was
8 going to charge in 2011?

9 A We should actually be clear,
10 seeking to charge, [REDACTED].

11 MR. SCHMIDT: May I approach, Your
12 Honor?

13 JUDGE SIPPEL: Yes, you may.

14 BY MR. SCHMIDT:

15 Q If you look at the combined price
16 that Comcast was seeking to charge for OLN
17 with NFL.

18 JUDGE SIPPEL: Is OLN the same
19 thing as Versus?

20 MR. SCHMIDT: Yes, sir.

21 THE WITNESS: Yes, it is.

22 BY MR. SCHMIDT:

1 Q Where would that be on chart?

2 A Well, for 2008 -- 2007 it would
3 have been at [REDACTED].

4 Q Okay. And where in 2008?

5 A 2008 at [REDACTED].

6 Q And where in 2009?

7 A Well, it's -- we're now comparing
8 apples and oranges, because the data is for
9 2007.

10 Q That's fine. Where would it be?

11 A It would at [REDACTED].

12 Q And where would it be in 2011? It
13 would be off the chart. Right?

14 A Well, it would off the chart.

15 Q Now, are you aware -- you used the
16 phrase, "What Comcast is seeking to charge".
17 Right?

18 A Yes.

19 Q I'm sorry. I'm not being precise.
20 You talked about what Versus was seeking to
21 charge if it got the eight games. Right?

22 A Yes.

1 Q And that was the amount that it
2 was seeking to charge to cover the [REDACTED]
[REDACTED]. Correct?

4 A Right. And they actually mention
5 on the second page that there was a risk that
6 the NFL surcharge would be declined, and the
7 disaster plan would be that TWC declines the
8 NFL surcharge.

9 Q Mr. Orszag, are you aware that
10 they were also going to charge Comcast that
11 surcharge, or they were going to seek to
12 charge Comcast that surcharge?

13 A With an MFN in place, is my
14 understanding. Yes.

15 Q Is the answer yes?

16 A Yes.

17 Q Let me give you another exhibit
18 that's been marked in evidence.

19 MR. SCHMIDT: If I may approach?

20 JUDGE SIPPEL: Yes, you may. And
21 while you're doing that, this is a rate card
22 that's basically -- this is a rate card that's

1 offered to the party you're trying to get to
2 accept the rates. So, whose rate card is
3 this?

4 THE WITNESS: It is -- well, this
5 is OLN's rate card that they are going to
6 propose to Time Warner.

7 JUDGE SIPPEL: Okay. Thank you.
8 Did I get what you're working with now?

9 MR. SCHMIDT: Yes, Your Honor. It
10 should say, "Comcast 2006 Plan."

11 JUDGE SIPPEL: Wait a minute. I
12 don't think I got one of those. This isn't
13 the one, is it?

14 MR. SCHMIDT: No, this is the one.

15 JUDGE SIPPEL: Thank you. This is
16 162. Already in?

17 MR. SCHMIDT: Yes.

18 JUDGE SIPPEL: What's the trouble?

19 MR. SCHMIDT: The court reporter
20 has noted for the record that I have trouble
21 walking and talking at the same time, which
22 comes as no surprise to me.

1 THE WITNESS: When there's a
2 convenient time, I wouldn't mind a walk down
3 the hall. There was too much information
4 yesterday.

5 MR. SCHMIDT: Okay. Let me just
6 finish up with these two documents.

7 BY MR. SCHMIDT:

8 Q Do you have in front of you
9 Exhibit 162?

10 A Yes, I do.

11 Q Now, this is the Versus rate card
12 for Comcast. Right?

13 A That's what it purports to be. I,
14 obviously, didn't create it, but that what it
15 suggests.

16 Q And under Item 2 it has a rate
17 card, OLN non-NFL. Right?

18 A Correct.

19 Q And under Item 3 it says, "OLN
20 with NFL". Right?

21 A Yes, it does.

22 Q And it has the same term that

1 Comcast was trying to buy the eight-game
2 package for. Right?

3 A Yes, it does.

4 Q And then it has rates that state
5 OLN NFL. Right?

6 A Well, you skipped a bullet, so it
7 says, "MFN non-size based NER MFN with TW and
8 NCTC carve-out."

9 Q Okay. And then it has rates.

10 A Yes, it does.

11 Q And we're going to go through a
12 lot of documents, so I'm going to ask you to
13 stick to the questions I ask you.

14 A Okay.

15 Q If that's okay.

16 A I just want to make sure, because
17 you said next was rates.

18 Q No, that was imprecision. I
19 apologize.

20 Look at the second rate card, if
21 you would, the one that says, "OLN NFL" at the
22 top. As I compare the total rate there versus

1 on the Time Warner rate card, it's the same.

2 Isn't it?

3 A That is correct.

4 Q And that's not particularly
5 surprising, that Versus was going to ask Time
6 Warner to pay the same amount they were going
7 to ask to pay to Comcast. Right?

8 A It doesn't surprise me.

9 Q Now, Comcast was the one that was
10 bidding the money for these games. Is that
11 right?

12 A Yes.

13 Q You've looked at a lot of Comcast
14 testimony. Right?

15 A I've observed -- I mean, I've read
16 various deposition testimony, and a variety of
17 documents.

18 Q And that was my next question.
19 You've looked at a lot of Comcast documents.
20 Right?

21 A Yes, I have.

22 Q Have you ever seen any indication

1 that if Versus came to Comcast and said we
2 want [REDACTED] a year for OLN with NFL, that
3 Comcast would say no, we're not going to pay
4 that? Did you ever see that in any document
5 or testimony?

6 A No, but it's a different question
7 than I examined.

8 MR. SCHMIDT: That's fine. Let's
9 take our break.

10 THE WITNESS: Thank you.

11 MR. SCHMIDT: If that's okay with
12 Your Honor.

13 JUDGE SIPPEL: Well, let's see.
14 We'll be in recess. I think we might as well
15 just take a 15-minute. Is that -

16 MR. SCHMIDT: That's fine, Your
17 Honor.

18 JUDGE SIPPEL: All right. Well,
19 something around 10 after 3 we'll be back.

20 MR. SCHMIDT: That's fine.

21 JUDGE SIPPEL: Thank you. We're in
22 recess.

1 (Whereupon, the proceedings went
2 off the record at 2:55:54 p.m., and went back
3 on the record at 3:19:34 p.m.)

4 JUDGE SIPPEL: Let's go back on
5 the record. Okay. You're still under oath.
6 Do you understand?

7 THE WITNESS: Yes, I do.

8 JUDGE SIPPEL: Okay. And we're
9 almost finished. Is that right, Mr. Schmidt?

10 MR. SCHMIDT: No, Your Honor. I've
11 probably got about an hour left to go.

12 JUDGE SIPPEL: I'm glad I asked.

13 MR. SCHMIDT: I think then I'll be
14 halfway up to what they had with Dr. Singer.

15 JUDGE SIPPEL: All right. Go
16 ahead. Go ahead.

17 BY MR. SCHMIDT:

18 Q Mr. Orszag, when we went off the
19 record, I was asking you about Comcast being
20 an economically rational company. Right?

21 A Yes.

22 Q Have you seen any documents in

1 this litigation that make you question that?

2 A No.

3 Q Okay. And, so, just so I

4 understand where we left off. As an

5 economically rational entity, Comcast was

6 willing to pay [REDACTED] for the eight-game

7 package so that those games could run on

8 Versus. Right?

9 A Let's get -

10 Q Correct?

11 A No, I don't agree to the

12 terminology "pay".

13 Q Okay.

14 A They were -

15 Q Can I try my question again, and

16 maybe resolve it then?

17 MR. CARROLL: Your Honor, can he
18 answer the question?

19 JUDGE SIPPEL: Well, I was going
20 to say -- yes, we're going back, starting all
21 over again. Why don't you just ask him to
22 interpret what this information shows him?

1 All right.

2 BY MR. SCHMIDT:

3 Q Was Comcast willing to give value
4 of [REDACTED] to get the games?

5 A They were willing to give expected
6 value of [REDACTED].

7 Q Okay. And they expected to get a
8 return on that value. Right?

9 A Comcast would expect to make a
10 profit on that value, yes.

11 Q And the way to make that profit on
12 that value was by running the games on Versus.
13 Right?

14 A Correct.

15 Q And by Versus then being able to
16 charge additional money to its cable carriers
17 that would make Comcast whole for the amount
18 it had paid for the games. Right?

19 A That is what they expected.

20 Q Okay. And you never saw anything
21 from Comcast that said we won't pay the extra
22 money to versus for the cost of those games on

1 Versus, did you?

2 A Well, they did have an MFN in
3 place, so they'd get the best price in the
4 market.

5 Q Okay. My question is different.

6 JUDGE SIPPEL: Now, is that the
7 most favored nation?

8 THE WITNESS: Most favored nation,
9 so if a Cox, for example, or DirecTV were able
10 to negotiate a lower price, Comcast, as a
11 cable distributor, would get that same lower
12 price.

13 JUDGE SIPPEL: I still am having a
14 problem with this. This is after -- the
15 programming is now owned by Versus?

16 THE WITNESS: Right. So -

17 JUDGE SIPPEL: Is this a
18 bookkeeping change, or what's going on?

19 THE WITNESS: It's effectively a
20 bookkeeping change, so Versus would acquire
21 the programming. The cable division would pay
22 [REDACTED] in the last year, or say [REDACTED] in